

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELIZABETH OLSON,)	
)	No. CV-09-0300-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION AND REMANDING FOR
)	ADDITIONAL PROCEEDINGS
MICHAEL J. ASTRUE, Commissioner)	PURSUANT TO 42 U.S.C. §
of Social Security,)	405(g)
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 14, 17.) Attorney Rebecca M. Coufal represents Elizabeth Olson (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff initially applied for disability insurance benefits and Supplemental Security Income (SSI) on February 1, 2007. (Tr. 117.) She alleged disability due to lupus, Sjogren's syndrome, bipolar disorder, post-traumatic stress disorder (PTSD), chronic pain, social anxiety, and methicillin-resistant staphylococcus aureus (MRSA), with an onset date of February 1, 2000. (Tr. 116, 121.) After benefits were denied initially and on reconsideration,

1 Plaintiff requested a hearing before an administrative law judge
2 (ALJ), which was held before ALJ R.S. Chester on February 5, 2009.
3 (Tr. 25-63.) Plaintiff, who was represented by counsel, and
4 vocational expert Sharon N. Welter (VE) testified. At the hearing,
5 Plaintiff withdrew the DIB application and amended the alleged onset
6 date for SSI benefits to the date of her SSI application, February
7 1, 2007.¹ (Tr. 30-31.) The ALJ denied benefits on February 24,
8 2009, and the Appeals Council denied review. (Tr. 1-4, 8-24.)
9 Plaintiff's claim is before this court pursuant to 42 U.S.C. §
10 405(g).

11 STANDARD OF REVIEW

12 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
13 court set out the standard of review:

14 A district court's order upholding the Commissioner's
15 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
16 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
17 Commissioner may be reversed only if it is not supported
18 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
Substantial evidence is defined as being more than a mere
scintilla, but less than a preponderance. *Id.* at 1098.
Put another way, substantial evidence is such relevant

19 ¹ The ALJ's decision dated February 24, 2009, does not reflect
20 the amended onset date or withdrawal of the DIB application as
21 discussed by Plaintiff's representative and the ALJ at the February
22 5, 2009, hearing. (Tr. 11.) It is noted on review the medical
23 evidence includes records dated 2002 through February 2009. (Tr.
24 174-578.) The hearing transcript indicates Plaintiff's
25 representative stated he was unable to obtain earlier records;
26 therefore, he amended the onset date to the date of Plaintiff's SSI
27 application date and withdrew the DIB application. (Tr. 31.)
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1 evidence as a reasonable mind might accept as adequate to
2 support a conclusion. *Richardson v. Perales*, 402 U.S.
3 389, 401 (1971). If the evidence is susceptible to more
4 than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of*
Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

5 The ALJ is responsible for determining credibility,
6 resolving conflicts in medical testimony, and resolving
7 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
8 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

9 It is the role of the trier of fact, not this court, to resolve
10 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
11 supports more than one rational interpretation, the court may not
12 substitute its judgment for that of the Commissioner. *Tackett*, 180
13 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
14 Nevertheless, a decision supported by substantial evidence will
15 still be set aside if the proper legal standards were not applied in
16 weighing the evidence and making the decision. *Browner v. Secretary*
17 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
18 there is substantial evidence to support the administrative
19 findings, or if there is conflicting evidence that will support a
20 finding of either disability or non-disability, the finding of the
21 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
22 1230 (9th Cir. 1987).

23 SEQUENTIAL EVALUATION

24 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
25 requirements necessary to establish disability:

26 Under the Social Security Act, individuals who are
27 "under a disability" are eligible to receive benefits. 42
28 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
medically determinable physical or mental impairment"

1 which prevents one from engaging "in any substantial
2 gainful activity" and is expected to result in death or
3 last "for a continuous period of not less than 12 months."
4 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
5 from "anatomical, physiological, or psychological
6 abnormalities which are demonstrable by medically
7 acceptable clinical and laboratory diagnostic techniques."
8 42 U.S.C. § 423(d)(3). The Act also provides that a
9 claimant will be eligible for benefits only if his
10 impairments "are of such severity that he is not only
11 unable to do his previous work but cannot, considering his
12 age, education and work experience, engage in any other
13 kind of substantial gainful work which exists in the
14 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
15 the definition of disability consists of both medical and
16 vocational components.

17 In evaluating whether a claimant suffers from a
18 disability, an ALJ must apply a five-step sequential
19 inquiry addressing both components of the definition,
20 until a question is answered affirmatively or negatively
21 in such a way that an ultimate determination can be made.
22 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
23 claimant bears the burden of proving that [s]he is
24 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
25 1999). This requires the presentation of "complete and
26 detailed objective medical reports of h[is] condition from
27 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
28 404.1512(a)-(b), 404.1513(d)).

1 The Commissioner has established a five-step sequential
2 evaluation process for determining whether a person is disabled. 20
3 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
4 137, 140-42 (1987). In steps one through four, the burden of proof
5 rests upon the claimant to establish a prima facie case of
6 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
7 920, 921 (9th Cir. 1971). This burden is met once a claimant
8 establishes that a physical or mental impairment prevents her from
9 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),
10 416.920(a). At step five, the burden shifts to the Commissioner to
11 show that (1) the claimant can perform other substantial gainful
12 activity; and (2) a "significant number of jobs exist in the
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1 national economy" which claimant can perform. 20 C.F.R. §§
2 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
3 1498 (9th Cir. 1984).

4 STATEMENT OF THE CASE

5 The facts of the case are set forth in detail in the transcript
6 of proceedings and are briefly summarized here. Plaintiff was 29
7 years old at the time of the hearing and had an 11th grade education,
8 a high school equivalency degree and one year of community college.
9 (Tr. 32, 34.) At the time of the hearing, she was living in a
10 women's shelter with her eleven month old baby. (Tr. 47.) She
11 testified she could walk three or four blocks and stand ten minutes
12 before she experienced pain. (Tr. 35-36.) She has past work
13 experience as a fast food worker, a cashier, a grocery store bagger,
14 a telephone solicitor, and a short order cook. (Tr. 56.) Plaintiff
15 reported she could not work because of pain and fatigue from lupus
16 flare-ups, water retention in her legs and ankles, and MRSA
17 outbreaks that cause fever, blisters and abscesses. (Tr. 37-41.)

18 ADMINISTRATIVE DECISION

19 At step one, ALJ Chester found Plaintiff had not engaged in
20 substantial gainful activity since the amended alleged onset date.
21 At step two, he found Plaintiff had severe impairments of "lupus,
22 Sjogren's, MRSA, and bronchitis," and no severe mental impairment.
23 (Tr. 13-14.) At step three, the ALJ found Plaintiff's impairments,
24 alone and in combination, did not meet or medically equal one of the
25 listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations
26 No. 4 (Listings). (Tr. 16.) Specifically, he found she did not
27 meet Listings 14.02, 14.10, or 8.04. (*Id.*) At step four, he
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1 determined she was capable of light work. (Tr. 17.) In his
2 discussion of the evidence, ALJ Chester found Plaintiff's subjective
3 symptom testimony was not credible to the extent her alleged
4 limitations were inconsistent with the RFC findings. (Tr. 18-22.)
5 Based on the RFC and VE testimony, the ALJ concluded Plaintiff could
6 still perform her past work as a cashier and telephone solicitor
7 and, therefore, had not been under a disability as defined by the
8 Social Security Act since the date her SSI application was filed.
9 (Tr. 22-23.)

10 ISSUES

11 The question presented is whether the ALJ's denial of benefits
12 is supported by substantial evidence and free of legal error.
13 Plaintiff argues the ALJ erred at step two when he failed to
14 identify her diagnosed depression, anxiety, fibromyalgia, Von
15 Willebrands disease, and chronic pain as severe impairments. She
16 contends also the ALJ erred when he (1) found she did not meet the
17 Listings; (2) did not take medical expert testimony to determine if
18 her impairments alone or in combination meet or equal a Listing; (3)
19 did not consider her impairments in combination at step four; and
20 (4) failed to address examining psychologist Scott Mabee's
21 evaluation and opinions. (Ct. Rec. 15, 19.)

22 DISCUSSION

23 A. Step Two

24 1. Medically Determinable Impairments

25 Plaintiff argues the ALJ erred at step two when he failed to
26 make findings regarding medical diagnoses of depression, anxiety,
27 fibromyalgia, Von Willebrands disease and chronic pain disorder.
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(Ct. Rec. 15 at 11.) At step two of the sequential evaluation, the ALJ determines whether a claimant suffers from a "severe" impairment, *i.e.*, one that significantly limits her physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c). To satisfy step two's requirement of a severe impairment, the claimant must prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. The fact that a medically determinable condition exists does not automatically mean the symptoms are "severe," or "disabling" as defined by the Social Security regulations. *See, e.g., Edlund*, 253 F.3d at 1159-60; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

The Commissioner's policy ruling instructs that an impairment may be found to be not severe when "medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work." *Social Security Ruling (SSR) 85-28*.² "The

² Social Security Rulings are issued to clarify the Commissioner's regulations and policy. They are not published in the federal register and do not have the force of law. However, under the case law, deference is to be given to the Commissioner's interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9th Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3 (9th Cir. 1991). The Supreme Court upheld the validity of the

1 severity requirement cannot be satisfied when medical evidence shows
2 that the person has the ability to perform basic work activities, as
3 required in most jobs." *Id.* Further, where non-severe impairments
4 exist, the combined effect of these impairments must be considered
5 to determine if, together, they have a significant impact on the
6 ability to work. 20 C.F.R. § 416.923. Thus, the effects of
7 medically determinable severe and non-severe impairments, in
8 combination, must be considered throughout the sequential evaluation
9 process.

10 As explained in the Commissioner's policy ruling, "medical
11 evidence alone is evaluated in order to assess the effects of the
12 impairments on ability to do basic work activities." SSR 85-28.
13 Thus, in determining whether a claimant has a severe impairment, the
14 ALJ evaluates the medical evidence submitted and must explain the
15 weight given to the opinions of accepted medical sources in the
16 record. Here, the ALJ found several severe impairments, but
17 concluded Plaintiff had no severe mental impairments. (Tr. 14.)
18 Further, he did not discuss medical diagnoses of other impairments
19 that, if considered in combination with Plaintiff's chronic lupus,
20 Sjogren's, bronchitis, and MRSA (a highly infectious disease), may
21 have yielded a different conclusion regarding her eligibility for
22 benefits. For example, the record shows Plaintiff was diagnosed
23 with chronic pain, chronic fatigue, depression, and Von Willebrands
24 disease by her treating specialist Howard Kenny, M.D., and her
25 treating physician April Hume, M.D., in 2006. (See, e.g., Tr. 211,
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27 Commissioner's severity regulation, as clarified in SSR 85-28, in
28 *Bowen v. Yuckert*, 482 U.S. 137, 153-154 (1987).

214, 271.) The record shows these diagnoses continued throughout the record, that Plaintiff was treated with numerous medications, and the side effects the medications were a constant concern of her treating physicians. (See, e.g., Tr. 353-59, 367, 466-91.) Contrary to the Regulations, the ALJ failed to identify and evaluate these conditions and their symptoms in combination at step two. This is legal error and cause for reversal. See 20 C.F.R. §§ 416.927, .945.

In addition, in this evaluation of the medical evidence, ALJ Chester did not discuss or reject the opinions of Scott Mabee, Ph.D., and assessment specialist Abigail Osborne-Elmer, M.S. The Osborne-Elmer/Mabee findings are based on an psychological examination conducted in February 2009, and submitted to the ALJ prior to the scheduled hearing. (Tr. 558-78.) Their diagnoses of pain disorder and anxiety disorder and assessment of marked limitations in social functioning are derived from a mental status exam and a battery of objective psychological tests, the results of which are supported by documentation in the record. (*Id.*) This unrejected medical evidence establishes mental disorders that cause more than a minimal effect on Plaintiff's functioning, and should have been evaluated in the step two findings. Even if found to be not severe, these medically determinable impairments must be considered in combination with severe impairments by the adjudicator throughout the sequential evaluation.³

³ Based on the record before the court, it cannot be "confidently concluded" that the outcome of the proceedings would be

1 For step two purposes, Plaintiff met her burden of providing
2 objective medical evidence consisting of signs, symptoms, and
3 laboratory findings of chronic pain/fibromyalgia, Von Willebrands
4 disease, and depression, as well as medical records documenting
5 ongoing treatment with medication and counseling over the years. 20
6 C.F.R. § 416.926; *Webb v Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).
7 Further, Plaintiff's subjective complaints are consistent with
8 diagnoses of chronic pain, fibromyalgia, and depression.⁴ Even if
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11 unchanged if the identified step two errors were corrected. As
12 discussed below, the ALJ's failure consider all limitations
13 supported by the record, including pain and fatigue, when assessing
14 Plaintiff's ability to perform and sustain work, was prejudicial to
15 Plaintiff and is, therefore, not harmless error. See *Stout v.*
16 *Commissioner, Social Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir.
17 2006).

18 ⁴ The ALJ appears to have rejected totally Plaintiff's
19 complaints of fatigue as "due to her bout of viral meningitis."
20 (Tr. 19.) This reasoning is neither "clear and convincing" nor
21 supported by the record. The ALJ's total rejection of complaints of
22 fatigue ignores the documented symptoms of diagnosed diseases such
23 as lupus, MRSA, and chronic pain/fibromyalgia, and the side effects
24 of medications (including Prednisone) prescribed by treating and
25 hospital physicians. (See Tr. 214, 271, 358, 367, 502, 509.)
26 Further, without medical expert testimony regarding the combined
27 effects of Plaintiff's diseases, the ALJ's rejection of symptom
28 allegations is not supported by substantial evidence. On remand,

1 the evidence does not establish the diagnosed impairments establish
2 more than "slight abnormality," the ALJ erred by excluding them
3 entirely in his step two findings and failing to consider their
4 effects in combination with severe impairments throughout the
5 proceedings. 20 C.F.R. § 416.929. The ALJ's step two findings are
6 not supported by substantial evidence and are based on legal error.

7 **B. Step Three: The Listings**

8 The Commissioner has promulgated a "Listing of Impairments"
9 that are "so severe that they are irrebuttably presumed disabling,
10 without any specific finding as to the claimant's ability to perform
11 his past relevant work or any other jobs." *Lester v. Chater*, 81
12 F.3d 821, 828 (9th Cir. 1995). If a claimant's impairment does not
13 meet the criteria specified in the Listings, he or she is still
14 disabled if the impairment equals a listed impairment. 20 C.F.R. §
15 416.920(d). If a claimant has more than one impairment, the
16 Commissioner must determine whether the combination of impairments
17 is medically equal to any listed impairment. 20 C.F.R. §
18 416.926(a). A claimant's symptoms "must be considered in
19 combination and must not be fragmentized in evaluating their
20 effects." *Lester*, 81 F.3d at 829. A finding of medical equivalence
21 must be based on medical evidence from acceptable medical sources
22 only, i.e. licensed psychologists or physicians designated by the
23 Commissioner. 20 C.F.R. §§ 416.929(d)(3), .926 (c),(d).

24 At the ALJ hearing and in her appeal to the Appeals Council,
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26 the ALJ shall identify allegations deemed unreliable and give "clear
27 and convincing" reasons for rejecting them. *Thomas v. Barnhart*, 278
28 F.3d 947, 958-959 (9th Cir. 2002); *Bunnell*, 947 F.2d at 345-46.

1 Plaintiff argued her medically determinable impairments met or
2 equaled Listings sections 14.02 (*Systemic Lupus Erythematosus*) and
3 8.40 (*Chronic Infections of the Skin or Mucous Membranes*). (Tr. 31,
4 61, 171-72.) Plaintiff's representative specifically argued the
5 need for medical expert testimony on the combined effects of
6 Plaintiff's impairments and requested the submission of
7 interrogatories to a medical expert for step three evidence.
8 Plaintiff has presented a reasonable theory of medical equivalence.
9 (Tr. 62.)

10 "Longstanding policy requires that the judgment of a physician
11 or psychologist designated by the Commissioner on the issue of
12 equivalence on the evidence before the administrative law judge . .
13 . must be received into the record as expert opinion evidence and
14 given appropriate weight." SSR 96-6p. The Commissioner advises
15 when the evidence suggests a judgment of equivalence may be
16 reasonable and a medical judgment as to medical equivalence must be
17 made by the ALJ, a medical expert must be called. *Id.*

18 Because the issue of medical equivalence is outstanding, and it
19 is not clear from the record that Plaintiff is disabled, remand for
20 medical expert testimony and additional proceedings is warranted.
21 *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004); *Lester*, 81
22 F.3d at 830, 834; *Smolen v. Chater*, 80 F.3d 1273, 1291-92 (9th Cir.
23 1996); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir 1990); *Hammock*
24 *v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989).

25 **C. Step Four**

26 The Commissioner has defined the RFC as an "assessment of an
27 individual's ability to do sustained work-related physical and
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1 mental activities in a work setting on a regular and continuing
2 basis," i.e., for eight hours a day for five days a week, or an
3 equivalent work week. SSR 96-8p. The effects of pain and other
4 symptoms must also be discussed and included in the RFC
5 determination, to the degree consistent with medical and other
6 evidence. *Id.*⁵ Here, the ALJ found no cognitive or social
7 functioning limitations due to psychological impairments, pain, or
8 fatigue. (Tr. 17.) This determination is not supported by
9 substantial evidence. For example, in discussing the medical
10 evidence, the ALJ gave significant weight to a psychological
11 evaluation by Sean Caldwell, M.S. candidate, which was adopted by
12 Mahlon Dalley, Ph.D. This evaluation was completed in June 2006.
13 (Tr. 199-208.) The evaluators assessed a generalized anxiety
14 disorder order and personality disorder, nos, and opined Plaintiff's
15 moderate limitation in her ability to interact appropriately would
16 not interfere with her ability to work. (Tr. 201-202, 208.)
17 However, this evaluation was made prior to the relevant period at
18 issue and does not appear to have included a review of medical

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20 ⁵ It is noted on review that during VE testimony, Plaintiff's
21 attorney asked the VE whether Plaintiff's highly infectious chronic
22 MRSA outbreaks would have a significant effect on her ability to
23 perform her past work. (Tr. 60.) The VE responded this was a
24 medical restriction and declined to opine on how this impairment
25 would impact her employability. (Tr. 60-61.) Considering the severe
26 nature of this disease, further medical evidence is required to
27 clarify the effects of MRSA on employability. On remand, medical
28 expert testimony regarding this issue shall be obtained.

1 records. (Tr. 203-04.) Further, the evaluator's conclusion that
2 any mental impairment would be of limited duration (0 months) is
3 contradicted by evidence of ongoing depression, chronic pain and
4 fatigue, and anxiety diagnoses and treatment after 2006. (Tr. 202,
5 209, 466-67, 504-05, 522.) Significantly, the Caldwell/Dalley
6 evaluation is contradicted by Dr. Mabee's unrejected narrative
7 report and assessment (made in 2009) that Plaintiff suffered marked
8 limitations in social functioning due to anxiety and pain disorder.
9 (Tr. 564, 577.)

10 It was legal error to make step four findings without
11 considering all probative evidence in the entire medical record. 20
12 C.F.R. §§ 416.927, .945; SSR 96-8p . Further, the RFC determination
13 does not include any discussion of non-exertional limitations caused
14 by medication side-effects or chronic pain and fatigue due to
15 complications of lupus and MRSA, effects thoroughly documented in
16 the record. See 20 C.F.R. § 416.945 (d) and (e). If on remand,
17 the ME opines Plaintiff's combined impairments do not meet or equal
18 a Listing, the ALJ will consider - alone and in combination - those
19 severe and non-severe medically determinable physical and mental
20 impairments identified by the medical expert and supported by the
21 evidence and make a new RFC determination as directed by SSR 96-8p.
22 Additional VE testimony will be necessary to evaluate (1) all
23 unrejected limitations in combination, and (2) their effect on the
24 Plaintiff's ability to perform and sustain past relevant work, and
25 if step five findings are necessary, other work in the national
26 economy. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is **GRANTED** and the matter is remanded to the Commissioner for an immediate award of benefits.

2. Defendant's Motion for Remand (**Ct. Rec. 17**) is **DENIED**;

3. Application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for **Plaintiff**, and the file shall be **CLOSED**.

DATED November 3, 2010.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE